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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In re Applications of)
RAINBOW BROADCASTING COMPANY)
For an extension of time)
to construct)
and)
For an Assignment of its)
construction permit for)
Station WRBW(TV), Orlando, Florida)

GC Docket No. 95-468
File No. BMPCT-910625KP
File No. BMPCT-910125KE
File No. BTCCT-911129KT

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TO: The Honorable Joseph Chachkin
Administrative Law Judge

OPPOSITION TO
"PETITION FOR RECONSIDERATION OF ORAL RULING"

1. Press Broadcasting Company, Inc. ("Press") hereby opposes the "Petition for Reconsideration of Oral Ruling" submitted in the above-captioned proceeding by Rainbow Broadcasting, Limited ("RBL"). As discussed below, RBL's pleading is procedurally improper and wholly lacking in any substantive merit.

RBL's Petition is procedurally improper.

2. As a threshold matter, the Commission's rules specifically prohibit petitions for reconsideration in hearing proceedings. Section 1.106(a)(1) of the rules states in relevant part as follows:

A petition for reconsideration of an order designating a case for hearing will be entertained if, and insofar as, the petition relates to an adverse ruling with respect to petitioner's participation in the

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proceeding. Petitions for reconsideration of other interlocutory actions will not be entertained.

47 C.F.R. §1.106(a)(1) (emphasis added). It is clear that RBL's petition does not relate to "an adverse ruling with respect to [its] participation" herein. Accordingly, RBL's petition is barred by the express and unequivocal language of the Commission's rules, and it can and should be summarily dismissed.

RBL's Petition is substantively without merit.

3. Even if RBL's Petition were, arguendo, to be considered on its "merits", it is clear that there is absolutely no valid justification for RBL's position. At the January 30, 1996, Prehearing Conference herein, Press requested that RBL identify the names and addresses of all ^{1/} of RBL's limited partners, so that Press may undertake appropriate discovery -- RBL is, after all, a party to one of the above-captioned applications and, as discussed below, its principals (all general and limited partners, past and present) are likely to have information relevant to the issues herein. RBL objected to Press' request.

^{1/} Press emphasizes that it is important that all of RBL's limited partners, present and/or past, be identified. RBL has heretofore never bothered to identify any of its limited partners since RBL was first formed (with the exception of Joseph Rey, who was identified as RBL's initial limited partner at the formation of the company). As a result, it is impossible at this time to determine whether any individuals who may have been limited partners at some point have since divested those limited partnership interests along the way. Press believes that any and all individuals who have ever held limited partnership interests in RBL, whether or not they hold such interests presently, should be identified.

Over RBL's objections, the Presiding Judge ordered RBL to provide the list, and RBL indicated that it would comply as soon as possible. Notwithstanding that representation, RBL has now sought reconsideration of the Presiding Judge's ruling.

4. RBL first claims that the limited partners are not relevant to any of the designated issues. That claim, however, is plainly absurd in light of the issues herein and the representations which RBL and Rainbow Broadcasting Company ("RBC") have previously made to the Commission.

5. For example, Issue 2 in this case relates to
whether [RBC] made misrepresentations of fact or was
lacking in candor with respect to its financial
qualifications regarding its ability to construct and
operate its station. . . .

In November, 1991, RBC filed its above-captioned application (File No. BTCCT-911129KT) proposing to assign its permit to RBL. In that application, RBC stated that

[RBC] is proposing a reorganization which will permit the permittee to reduce its reliance on debt to complete construction and commence operation of [Station WRBW] by December, 1992, by restructuring to admit nonvoting equity participants.

See Attachment A (RBC Assignment Application, Exhibit 1). That was, clearly, a representation concerning RBC's financial qualifications. And, equally clearly, RBC itself acknowledged therein that its assertion of financial qualification was based on the notion that it would admit "nonvoting equity participants", i.e., limited partners. In other words, RBC's claims concerning its financial qualifications were based on the

assumed existence of limited partners.^{2/} To the extent that limited partners were ultimately admitted to RBL, the facts and circumstances surrounding their admission are plainly relevant to the financial misrepresentation issue and, thus, disclosure of the names and addresses of the limited partners is likely to lead to the discovery of relevant evidence.^{3/} Any argument to the contrary is simply wrong.

6. RBL's second argument for non-disclosure is based on the notion that Press may somehow impose "irreparable injury" on RBL through the discovery process. RBL declines to state just how that might occur. Instead, RBL refers to what it describes as a "pattern of business interference" by Press directed against RBL. RBL Petition for Reconsideration at 5. RBL attempts to support that claim by reference to a number of extraordinarily vague and self-serving claims by an RBL principal, none of which has any merit at all. Press is reluctant to engage in any point-by-point, detailed debate on RBL's various unfounded claims;

^{2/} Over the years RBC made further repeated references to its supposed reliance on "equity financing". See, e.g., "Rainbow Opposition to Informal Objection and Request to Hold Application in Abeyance", filed January 30, 1992, at 2; "Rainbow Response to Supplement to Informal Objections", filed May 13, 1993, at n.2.

^{3/} Indeed, in view of RBC's repeated assertions of reliance on "equity financing" to establish its financial qualifications, it is difficult to comprehend RBL's present-day claim that "[n]one of the RBL limited partners was involved with . . . the representations made by [RBC] to the F.C.C.", Rainbow Petition for Reconsideration at 2-3 -- unless RBL is conceding that repeated misrepresentations to the Commission were, in fact, made, concerning the financial qualifications of RBC/RBL.

after all, the focus of this proceeding is not Press, but Rainbow. However, so that the Presiding Judge may gain some sense of RBL's willingness to misstate the facts, we offer the following illustrations of the documentable baselessness of at least some of RBL's claims. ^{4/}

7. RBL notes, correctly, that Press' own antenna (for Press' Station WKCF(TV)) is co-located with that of Station WRBW(TV). RBL asserts that Press obtained its own access to that site "with full knowledge that [RBC] had an exclusive right" to certain antenna space at that site. RBL Petition for Reconsideration, Statement of Joseph Rey, ¶1 (emphasis added). It appears that RBL believes that Press somehow interfered with a contractual right of exclusivity, and that that interference was improper. But that notion assumes that RBC did indeed have some "exclusive right" to the tower. But in a case initiated and aggressively litigated by RBC (a case in which Press was not even a party), a Federal Judge rejected RBC's claim and concluded instead that RBC had no such "exclusive right". Rey v. Guy Gannett Publishing Co., 766 F.Supp. 1142 (S.D.Fl. 1991). ^{5/}

^{4/} So that the record is clear, Press specifically denies that it has engaged in any improper activities at all relative to RBC, RBL or Station WRBW(TV). For purposes of the instant Opposition Press is limiting its detailed discussion on this point to illustrative examples based on the available documentary record. That record clearly supports Press and, by contrast, reveals the general unreliability of Mr. Rey and RBL.

^{5/} Among other things, the Court in Rey concluded as follows:

The Lease may "fairly" be interpreted in only one way.
(continued...)

That decision has not been reversed or overruled. Thus, any claim by RBL that Press has acted improperly insofar as RBL's supposed "exclusive right" may be concerned is, at best, fanciful, unfounded wishful thinking on RBL's part (and, at worst, an unfortunate attempt to mislead the Presiding Judge).

8. Another of RBL's unfortunate claims is also disproved through readily available documentation. RBL's principal, Mr. Rey, states:

In late January, 1994, Press, after adequate notice from the Bithlo Tower landlord, refused to reduce power of its station, WKCF, located on the same tower as WRBW, to permit installation of the WRBW tower, hence endangering the lives of the installers in an attempt to prevent the installation from taking place. The installation was only made possible by the landlord's physical intervention and temporary reduction of WKCF's transmitting power.

Rainbow Petition, Statement of Joseph Rey, ¶4. What in fact happened in that particular incident was reported to the Commission, by Press, one day after the incident. A copy of Press' "Complaint Concerning Unauthorized Installation of Broadcast Equipment" is included as Attachment B hereto. ^{5/}

^{5/} (...continued)

Its terms are unambiguous and its meaning plain. . . . [T]he agreement specifically does not grant "exclusive" use of the top slot of the Bithlo Tower. . . . We can only find from a clear reading that Rainbow's antenna space was granted, pursuant to the unambiguous terms of the lease, on a "... non-exclusive basis" [Slip Opinion at 9-10].

^{5/} The supporting materials included with Press' original Complaint are not being submitted with this Opposition in the interest of limiting the volume of this pleading. Copies will be (continued...)

9. As the Presiding Judge will see, the actual facts vary substantially from the gloss placed on them by Mr. Rey. While Mr. Rey self-servingly claims that Press "refused to reduce power", that simply isn't true: Press repeatedly stated its willingness to cooperate with the tower landlord in the installation of the Station WRBW(TV) antenna, and was standing ready to do so when it was advised, without any prior notice, that the antenna installers had already scaled the tower and were in immediate proximity to Press' operating antenna.^{2/} At that time, of course, Press promptly reduced power to insure the safety of the tower workers.

10. It is odd that Mr. Rey would advance such an inaccurate

^{6/}(...continued)

provided upon request. Press assures the Presiding Judge that all those supporting materials in fact fully support the factual statements contained in the Complaint.

^{2/} As the Presiding Judge will note from Press' Complaint, Press was surprised that any effort to install the Station WRBW(TV) antenna might even be attempted at that time, since RBC/RBL did not have authority from the Commission to install that antenna -- a fact subsequently confirmed by the Commission. See Attachment C hereto. Press alerted the tower landlord to the apparent need for Commission approval and, upon being advised by the landlord that the lack of authority would not, in the landlord's view, prevent installation, Press agreed to cooperate. One full day before the installation occurred, the landlord agreed to provide to Press certain technical information concerning the Station WRBW(TV) antenna, in order to satisfy Press that the newly-proposed antenna would not cause technical problems to Press' operation. Press called the landlord seeking that technical information during the 24 hours prior to installation, and was assured that the information would be forthcoming. The information had still not been received by Press when Press was advised that the tower workers had already climbed the tower. See Attachment B.

gloss, since a copy of Press' Complaint was served on RBL's counsel in January, 1994. Neither RBC nor RBL (nor anyone else, for that matter) responded to Press' January 28, 1994 Complaint.^{8/} Thus, RBL's attempts to depict Press as some kind of ogre are obviously at odds with the truth. Since RBL's Petition is pure speculation derived not from any facts, but rather from RBL's self-servingly (and demonstrably) inaccurate claims concerning Press, it would plainly be inappropriate and unwarranted to limit the discovery process on the basis of such speculation.

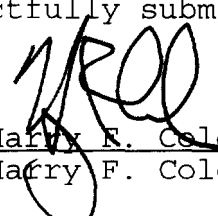
11. It would also be inappropriate and unwarranted to permit RBL's Petition to obstruct and delay discovery in any way. Already, RBL has managed to delay by some two weeks the disclosure of information which is, presumably, readily available to it. To prevent any further such delay, Press requests that the Presiding Judge take immediate action denying or dismissing RBL's Petition and ordering it to provide a complete list of its limited partners, present or past, to Press immediately.

WHEREFORE, for the reasons stated, the Petition for Reconsideration of Oral Ruling filed by Rainbow Broadcasting,

^{8/} By letter (Ref. 1800E1-AL), dated June 2, 1994, Barbara A. Kreisman, Chief, Video Services Division, concurred with Press that Rainbow's installation of its equipment without proper Commission authorization was contrary to the rules. Ms. Kreisman also indicated that the tower owner might be held responsible for the potential radiation exposure to tower workers. Ms. Kreisman did not find any culpability on the part of Press. A copy of Ms. Kreisman's letter is included as Attachment C hereto.

Limited, should be denied, and RBL should be ordered to provide to Press, immediately, a complete list of all the limited partners, present or past, of RBL.

Respectfully submitted,


/s/ Harry F. Cole
Harry F. Cole

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Counsel for Press Broadcasting
Company, Inc.

February 12, 1996

ATTACHMENT A

EXHIBIT 1

Rainbow Broadcasting Company is proposing a reorganization which will permit the permittee to reduce its reliance on debt to complete construction and commence operation of a new UHF television station on Channel 65, Orlando, Florida by December 1992, by restructuring to admit nonvoting equity participants.

Under the proposed reorganization, the existing partners of Rainbow Broadcasting Company, Joseph Rey and Leticia Jaramillo, will become the sole stockholders of Rainbow Broadcasting Co., Inc., the corporate general partner of Rainbow Broadcasting, Ltd. Joseph Rey and Leticia Jaramillo presently hold 90% and 10% interests in the general partnership; they will hold the same respective voting interests in the corporate general partner, Rainbow Broadcasting Co., Inc. Joseph Rey will be the initial limited partner and will withdraw as a limited partner upon the admission of other limited partners.

This reorganization of the business form of the permittee will result in no change of voting control or percentage of voting power of each of the present general partners.

ATTACHMENT B

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re)
RAINBOW BROADCASTING COMPANY)
Permittee of Station WRBW(TV),)
Orlando, Florida)

RECEIVED

JAN 28 1994

**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY**

TO: The Commission
The General Counsel
Roy J. Stewart, Chief, Mass Media Bureau
Richard M. Smith, Chief, Field Operations Bureau

COMPLAINT CONCERNING
UNAUTHORIZED INSTALLATION OF BROADCAST EQUIPMENT

1. Press Broadcasting Company, Inc. ("Press"), licensee of Station WKCF(TV), Clermont, Florida, hereby advises the Commission (as well as its General Counsel and the two Bureaus most directly involved with such matters) of apparently unauthorized installation of a directional broadcast antenna by Rainbow Broadcasting Company, permittee of Station WRBW(TV), Orlando, Florida. Press also requests that the Commission take prompt action to remedy this situation.

2. Press' transmitter site for Station WKCF(TV) is a tower owned and operated by Guy Gannett Broadcasting (or an affiliated company). As it happens (and as the Commission is well aware ^{1/}), Rainbow's construction permit specifies the same

^{1/} Press and Rainbow have been adverse parties in various proceedings involving a variety of Commission-related matters, both before the Commission and the U.S. Court of Appeals for the District of Columbia Circuit, for more than five years already. Most recently, there are pending before the Commission a number of serious questions concerning Rainbow. See, e.g., Press' Emergency
(continued...)

tower (and, in effect, the same height) as Press' operation.

3. Rainbow's permit also specifies use of a directional antenna. On December 13, 1993 -- approximately one month ago -- Rainbow filed an application (FCC Form 301) for authority to substitute another directional antenna for the one which is currently specified in its permit. See BMPCT-931213KE. Prior Commission approval is required before any such substitution can be made. Section 73.1690(b)(1). According to review of Commission records as of January 27, 1994, that application has not yet been acted upon and remains pending.

4. Notwithstanding the fact that, at least as far as Press can determine, Rainbow does not have authority to install its substitute antenna, Rainbow has gone forward with that installation as of January 27, 1994. Installation of a directional antenna other than the antenna specified in Rainbow's presently outstanding construction permit was completed at approximately 3:00 p.m. on that date. Moreover, that installation was accomplished in a reckless manner which caused the exposure of workers performing the installation to potentially hazardous levels of radiation and which led to the interruption of Station WKCF(TV)'s operation without prior

^{1/}(...continued)

Petition for Immediate Rescission, Setting Aside or Vacation of Action Taken Pursuant to Delegated Authority, filed August 13, 1993. The Commission is presently subject to an order of the U.S. Court of Appeals to respond to Press' "Second Petition for Issuance of Writ of Mandamus and Request for Issuance of Subpoenas" relating to the same general matters. See In re Press Broadcasting Company, Order filed January 24, 1994 (D.C. Cir.).

notice.

5. As a threshold matter, the mere fact that Rainbow has installed a directional antenna for which it has no prior authorization is a blatant violation of the rules, a violation which should not be ignored. Press urges the Commission to take appropriate measures to discourage such flouting of the Commission's regulatory authority. Such measures would include, at a minimum, a significant fine as well as an order requiring the dismantling and removal of the unauthorized installation.^{2/} Any penalty short of that will simply encourage all applicants to proceed with their construction whether or not they happen to hold the required authorization from the Commission. Absent a clear contrary message here, such applicants could act safe in the knowledge that the Commission's prohibition against unauthorized construction really doesn't mean what it seems to say.

6. The circumstances surrounding the actual installation also warrant the most serious possible penalty. Recall that Press' antenna (which operates with approximately five megawatts of power) is located at virtually the same height as Rainbow's specified antenna height. When Press installed its

^{2/} Requiring the dismantling and removal of the installation is especially appropriate in view of the fact that Rainbow's underlying construction permit to operate on Channel 65 (albeit with a directional antenna different from the one which Rainbow has taken it upon itself to install) is subject to rescission in any event for numerous reasons as to which Press has already alerted the Commission. See, e.g., Press' Emergency Petition (filed August 13, 1993) and Press' Contingent Application for Review, both of which are presently pending.

antenna (approximately three years ago), Press went to significant lengths to have pattern studies run to assure that its operation of Station WKCF(TV) would not interfere with the operation of the unbuilt facilities specified in Rainbow's construction permit. When Press learned for the first time, in the last week of 1993, that Rainbow intended to change those facilities, Press sought assurances from Gannett that the same protective measures would be taken vis-à-vis Press' facilities -- Press demanded an "apples-to-apples" comparison of Rainbow's newly-proposed antenna specifications, ideally to be performed by the same organization which had performed the initial studies in connection with the installation of Press' antenna (which initial studies had been accepted by Gannett and, Press understands, by Rainbow). That request was made in writing to Gannett on January 5, 1994. A copy of that letter is included as Attachment A hereto.

7. Unfortunately, Gannett refused to accede to Press' request. See letter included as Attachment B hereto. Indeed, Gannett did not even assure Press that Gannett possessed any such studies. Instead, Gannett advised Press that Gannett had been advised by a principal of Rainbow that such studies had been performed and that they indicated that there was not likely to be any interference. Such second-hand, self-serving, hearsay claims were of little comfort to Press, which insisted upon reviewing the reports themselves.

8. On January 26, 1994, Robert McAllan, President of

Press, discussed the matter several times with an executive of Gannett. At the conclusion of those discussions, at approximately 12:30 p.m. (i.e., early in the afternoon) Gannett agreed to provide Press with a certification from SWR (Rainbow's antenna manufacturer) stating that Rainbow's new antenna would not have any adverse impact on Press' operation; Gannett also agreed that Gannett would provide written assurance that, if Press' operation were to be adversely affected, Gannett would bear full responsibility (as the Gannett/Press lease generally provides in any event). For its part, Press agreed that if, upon preliminary review of the SWR certification, it was satisfied that no adverse impact was likely, Press would reduce the power of Station WKCF(TV) in cooperation with Gannett so that Rainbow's installation could be accomplished without exposing any installation workers to excessive radiation from the WKCF(TV) antenna.

9. Press understood that these documents were to be sent to Press' engineering personnel by telecopy on the afternoon of Wednesday, January 26 or sufficiently early on the morning of January 27 to permit construction to proceed promptly after delivery of the documents. Press' personnel stood by to receive and review the documents, so as not to delay the process in any way. However, the promised certification did not arrive. ^{3/}

^{3/} On January 26 Gannett did advise Press that the antenna to be mounted would be an an SWR Model No. SWHPS32EC/65, i.e., not the antenna specified in Rainbow's original construction permit, but rather the antenna specified in Rainbow's December, 1993
(continued...)

10. At approximately 9:30 a.m. on Thursday, January 27, Joseph Addalia, Press' Chief Engineer, contacted a representative of Gannett to inquire about the documents. Mr. Addalia was advised that the documents would be sent. Mr. Addalia was not advised that the tower riggers would be proceeding to the 1500-foot aperture (the level of Press' antenna) or beginning installation at any particular time or that there was any reason to believe that the procedure which had been agreed-upon the day before (i.e., that Press would cooperate upon provision to it of the documents which it had requested) had changed in any way.

11. Somewhat more than an hour later, the documents still had not arrived. However, at that time (approximately 11:05 a.m.) Mr. Addalia received a call from a Gannett representative at the tower site advising that a crew of tower riggers was at work installing the Rainbow antenna -- even though they were, as a result, working in close proximity to the WKCF(TV) antenna which was, at that time, transmitting at full

^{3/}(...continued)
application. Gannett also supplied mechanical prints of the SWR antenna on January 26. However, those prints, without any accompanying analysis, did not provide any assurance that no adverse impact would occur. Rather, those prints merely provided depictions of the external dimensions of Rainbow's antenna assembly. Since the assembly consists of an antenna completely encompassed within a radome, the mechanical prints in effect provided the dimensions of the overall radome; they did not afford any technical information about the actual antenna encompassed within the radome.

power. ^{4/} Mr. Addalia advised the Gannett representative that, in light of the procedure which had been agreed to less than 24 hours earlier, Mr. Addalia would have to obtain authorization from Press management to reduce power, that he would seek such authorization at once, and that in the meantime the tower riggers should move to the 1400-foot platform on the tower in order to avoid radiation. Mr. Addalia immediately contacted Mr. McAllan to apprise him of the situation. But in the meantime, the Gannett representative, acting without notice to or approval from Press, entered Press' transmitter building and shut down one of the visual cabinets.

12. Shortly thereafter (at approximately 11:20 a.m), immediately after being apprised of the situation (including, in particular, the news that, without prior notice to or coordination with Press, a crew of workers had been sent up the tower) and confirming that situation with a Gannett official, Mr. McAllan instructed Mr. Addalia to reduce the station's overall power in order to prevent any hazard to the tower crew. Mr. McAllan also expressed to the Gannett representative his

^{4/} Press emphasizes that Press was given no notice or warning that the tower riggers were in fact being sent up the tower at that time. Rather, Press was still under the impression that construction would not commence unless and until the documents which Gannett had promised had been delivered. Since they had not been delivered, and no additional information had been given to Press concerning the precise scheduling of the installation, Press did not know, and could not have known until being so notified by Gannett, that the tower workers were, in fact, working on the tower in close proximity to Press' antenna. By contrast, Gannett's representatives at the tower plainly were in a position to know the situation and to take proper precautions to prevent any workers from scaling the tower while Press' antenna was in operation.

disbelief that Gannett would recklessly endanger the tower workers in this manner, particularly after Press had agreed to cooperate with the installation.

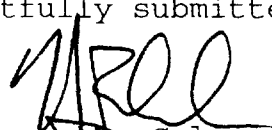
13. Press obviously protests the unfortunate interruption of its operation under these circumstances. Press also notes for the record that Gannett, the tower owner, is itself a broadcast licensee which is (or should be) familiar with the Commission's rules. Gannett was advised by Press, through counsel, that, to the best of Press' knowledge, Rainbow did not have authority from the Commission to install its antenna. Press also provided Gannett with the file number of Rainbow's currently pending application to specify the new antenna, so that Gannett could satisfy itself that that application had not yet been granted. Gannett, for its part, has offered Press no demonstration that the installation of the Rainbow antenna was authorized in any way.

14. As of now, as far as Press is aware, Rainbow has not sought to operate its newly-installed (and still apparently unauthorized) antenna. Nevertheless, the violation of Section 73.1690 has occurred, continues to occur, and should be corrected before Rainbow decides that, having installed its antenna without authority, it can also operate the antenna without authority as well. The Commission owes it to all of its regulatees -- including Press -- to take prompt, effective steps

to prevent such gross abuses of its rules. ^{5/}

WHEREFORE, for the reasons stated, Press Broadcasting Company, Inc. registers the foregoing complaint about the installation of an unauthorized directional antenna, and Press urges the Commission to take prompt, effective steps to remedy that situation, including at a minimum a significant fine and an order requiring the dismantling and removal of the unauthorized antenna.

Respectfully submitted,


/s/ Harry F. Cole
Harry F. Cole

Bechtel & Cole, Chartered
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Suite 250
Washington, D.C. 20036
(202) 833-4190

Counsel for Press Broadcasting
Company, Inc.

January 28, 1994

^{5/} Press also places the Commission on notice that any failure by the Commission to take such prompt, effective steps will be brought to the attention of the Court of Appeals by Press.

ATTACHMENT C

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

JUN 2 1994

IN REPLY REFER TO:

1800E1-AL

Rainbow Broadcasting, Ltd.
c/o Katrina Renouf, Esquire
Renouf & Polivy
1532 Sixteenth Street, N.W.
Washington, D.C. 20036

Press Broadcasting Company, Inc.
c/o Harry F. Cole, Esquire
Bechtel & Cole
Suite 250
1901 L Street, N.W.
Washington, D.C. 20036

Re: Application of Rainbow Broadcasting,
Ltd. for Modification of Construction
Permit (FCC File No. BMPCT-931213KE)

Dear Counsel:

This is in reference to the application for modification of unbuilt television station, WRBW, Channel 65, Orlando, Florida, filed by Rainbow Broadcasting, Ltd. (Rainbow) on December 13, 1993. See FCC File No. BMPCT-931213KE. In that application, Rainbow seeks consent to substitute its authorized directional antenna with one produced by a different manufacturer. By letter of December 28, 1993, Press Broadcasting Company, Inc. (Press) formally opposed the Rainbow modification application and, on January 28, 1994, filed a "Complaint Concerning Unauthorized Installation of Broadcast Equipment." Rainbow responded to Press's December 28, 1993 letter.¹

¹ Rainbow filed a request for immediate consideration of its modification application, on March 14, and sought a special temporary authorization (STA), on March 16, 1994, so that it could initiate program testing. Press opposed the request for immediate consideration on March 18, 1994. Rainbow again requested immediate action on its modification application, on April 22, 1994. Press responded to that request and Rainbow replied. In light of our decision below, we dismiss Rainbow's several requests as moot.

In its December 28, 1993 opposition, Press contends that Mass Media Bureau staff should be recused from acting on any application involving Rainbow, including Rainbow's modification application now before us, because of Rainbow's alleged ex parte contacts with the Bureau during the summer of 1993. Those contacts allegedly occurred in connection with Rainbow's requests for extension of time to construct. See FCC File Nos. BMPCT-910625KP and BMPCT-910125KE. Even if the Bureau were recused, Press argues that no action should be taken with regard to the modification application prior to a "full and final determination" that Rainbow is qualified to remain a permittee. Finally, Press asserts that Rainbow's failure to serve on Press a copy of its modification application constitutes a "separate and independent" violation of the ex parte rules in this proceeding.

The allegations of ex parte violations and the validity of the underlying construction permit have since been addressed by the Commission. Rainbow Broadcasting Company, FCC 94-122, released May 23, 1994. Finding Rainbow basically qualified to be a permittee, the Commission affirmed the reinstatement of Rainbow's construction permit and call sign and granted it a 12-month extension to construct. Further, the Commission not only found that Rainbow's modification application was an authorized ex parte presentation, one not required to be served on Press, id. at 11 n.17, but it directed the Bureau to process Rainbow's modification application and to review the merits of Press's complaint. Id. at 10 n.16. We now abide by that direction.

Press's January 28, 1994 complaint maintains, in essence, that Rainbow is in violation of Section 73.1690(b)(1), because it has already installed the antenna it seeks consent to utilize. Additionally, Press argues that circumstances surrounding the installation of that antenna "warrant the most serious possible penalty," because workers were allegedly exposed to potentially hazardous levels of radiation.

Section 73.1690(b)(1) provides that any change in the directional radiation characteristics of a directional antenna system "may be made only upon specific authority of the FCC." Rainbow does not deny that it installed the directional antenna specified in its modification application, but claims that it was compelled to proceed with construction in order to meet the then-existing March 1994 deadline for completing construction of the WRBW facility. Although the radiation pattern for the new antenna is, according to Rainbow's engineering exhibit, "substantially the same as that which had been authorized," Section 73.1690(b)(1) governs antenna substitutions creating "[a]ny change." Thus, Rainbow was required to await Commission approval before installing a directional antenna other than the one authorized. However, we do not believe, as Press suggests, that the

appropriate remedy here is a significant fine and an order to dismantle and remove the unauthorized antenna.

In the only published case involving a violation of Section 73.1690(b)(1), the permittee installed and commenced operations with a different directional antenna without even having filed a modification application. Bee Broadcasting Associates, 3 F.C.C. Rcd 4323, 4329 (MMB), rev'd on other grounds, 5 F.C.C. Rcd 6584 (1988). There, the Bureau deferred action on the permittee's pending application for a license to cover its construction permit until the permittee submitted an appropriate modification application and the staff had evaluated the proposed changes. Id. In the meantime, however, the Bureau granted the permittee a 180-day STA, or special temporary authorization, to continue operations "because the station is operating and providing service [pursuant to program test authority], as well as the fact that the variance in the directional antenna does not appear to be substantial." Id. Here, Rainbow's acts do not rise to the level of negligence found by the Bureau to have been committed by the permittee in Bee Broadcasting Associates: Rainbow has sought permission, via its modification application, to utilize a directional antenna different from that authorized; and, as Press acknowledges in its complaint, Rainbow has not attempted to operate the newly installed antenna. Accordingly, we admonish Rainbow for its failure to comply with Section 73.1690(b)(1). We caution permittees and licensees wishing to modify their directional antennas that they must receive Commission authority prior to installing those antennas, even if they are not actually operated.

As to the potential radiation exposure of tower workers installing the Rainbow antenna, we note that Press's allegations pertain to a one-time occurrence and are directed not to Rainbow, but to the owner and operator of the tower, Guy Gannett Broadcasting, which instituted and coordinated the installation of Rainbow's antenna. Accordingly, we shall refer this matter to the Commission's Office of Engineering and Technology, which may request further information regarding the circumstances under which the antenna was installed and the procedures undertaken in reducing the exposure of the tower workers to radiation.

In sum, we find that Rainbow is a qualified permittee and grant of the modification application is in the public interest in that it will allow initiation of a new UHF television service in Orlando, Florida. Accordingly, IT IS ORDERED that the December 28, 1993 formal letter opposition and the January 28, 1994